

1 THE HONORABLE JOHN H. CHUN
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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 CAITLIN JONES,

10 Plaintiff,

11 vs.

12 EMPOWERME WELLNESS, LLC, a
13 Missouri corporation,

14
15 Defendant.

Case No. 2:23-cv-00553-JHC

**16
17 AGREEMENT REGARDING
18 DISCOVERY OF ELECTRONICALLY
19 STORED INFORMATION AND
20 ORDER**

21 The parties hereby stipulate to the following provisions regarding the discovery of
22 electronically stored information (“ESI”) in this matter:

23 **A. General Principles**

24 1. An attorney’s zealous representation of a client is not compromised by conducting
25 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
26 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
contributes to the risk of sanctions.

27 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.
28 26(b)(1) must be applied in each case when formulating a discovery plan. To further the
29 application of the proportionality standard in discovery, requests for production of ESI and related

1 responses should be reasonably targeted, clear, and as specific as possible. This agreement is
2 intended to assist the parties in identifying relevant, responsive information that has been stored
3 electronically and is proportional to the needs of the case. The agreement does not supplant the
4 parties' obligations to comply with Fed. R. Civ. P. 34.

5 **B. ESI Disclosures**

6 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
7 party shall disclose:

8 1. Custodians. The custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, title, connection to
10 the instant litigation, and the type of information under the custodian's control.

11 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
12 drives, servers), if any, likely to contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
14 contain discoverable ESI (e.g., third-party email providers, mobile device providers, cloud
15 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
16 information stored in the third-party data source.

17 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
18 (by type, date, custodian, electronic system, or other criteria sufficient to specifically identify the
19 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

20 [Section (D)(3) below sets forth data sources and ESI which are not required to be preserved by
21 the parties. Those data sources and ESI do not need to be included on this list.]

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1 C. ESI Discovery Procedures

2 1. On-site inspection of electronic media. Such an inspection shall not be required
3 absent a demonstration by the requesting party of specific need and good cause or by agreement
4 of the parties.

5 2. Search methodology.

6 a. General Procedure: The parties shall timely confer to attempt to reach agreement
7 on appropriate search methodology to be used by each party, such as filtering for communications
8 among relevant custodians, applying date restrictions, and proposing relevant search terms to be
9 tested. The relevant custodians should be agreed upon as early as possible, and before collection
10 of data is completed. Once data is collected and search parameters are tested by the producing
11 party, if the results of those parameters return an unreasonably large number or volume of results
12 (*e.g.*, number of documents), or a large number of irrelevant or unrelated results, the parties will
13 advise what results will be reviewed and what will not be reviewed. After the parties discuss the
14 search parameters to be used and the results of those parameters, the receiving party may also
15 request additional or alternative the searches to be used, which should be considered as long as
16 they do not impose an undue burden on the producing party. If necessary, the parties will
17 cooperate to revise the search parameters towards the goal of reaching agreement on a reasonable
18 and proportional scope of review to be conducted and completed.

19 b. Guidelines for Specific Searches: The following provisions apply to search terms
20 or queries of the requesting party. Focused terms and queries should be employed; broad terms
21 or queries, such as product and company names, generally should be avoided. A conjunctive
22 combination of multiple words or phrases (*e.g.*, “computer” and “system”) narrows the search
23 and shall count as a single search term. A disjunctive combination of multiple words or phrases
24 (*e.g.*, “computer” or “system”) broadens the search, and thus each word or phrase shall count as
25 a separate search term unless they are variants of the same word. The producing party may
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1 identify each search term or query returning overbroad results demonstrating the overbroad
2 results and a counter proposal correcting the overbroad search or query.

3 3. Format.

4 a. The parties should discuss the format of productions before productions
5 are created to ensure the production is compatible with the e-discovery platform being used by
6 the receiving party, to include the file type for images (*e.g.*, TIFF, searchable PDF, etc.).

7 b. Unless otherwise agreed to by the parties, files that are not easily converted
8 to image format, such as spreadsheet, database, and drawing files, will be produced in native
9 format. Documents that contain redactions will not be produced in native format.

10 c. Each document image file shall be named with a unique number (Bates
11 Number). File names should not be more than twenty characters long or contain spaces. When a
12 text-searchable image file is produced, the producing party must preserve the integrity of the
13 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
14 the revision history.

15 d. If a document is more than one page, the unitization of the document and
16 any attachments and/or affixed notes shall be maintained as they existed in the original document.

17 f. The full text of each electronic document shall be extracted (“Extracted
18 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
19 format (or Unicode text format if the text is in a foreign language) and shall be named with a
20 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
21 production version of the document followed by its file extension).

22 4. De-duplication. The parties may de-duplicate their ESI production across custodial
23 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
24 information removed during the de-duplication process tracked in a duplicate/other custodian
25 field in the database load file.

1 5. Metadata fields. If the requesting party seeks metadata, the parties shall agree on
2 the metadata fields to be exchanged to the greatest extent practicable. The list of metadata type is
3 intended to be flexible and may be changed by agreement of the parties, particularly in light of
4 advances and changes in technology, vendor, and business practices.

5 6. Time Zone of Electronically Stored Communications. Where it is possible or
6 necessary to select a time zone in which electronic communications should be set when processing
7 data collected (e.g., email communications or text messages), all communications should be set
8 to Pacific Time Zone regardless of where the custodian normally resides. The purpose of this is
9 to ensure consistency of the time stamps of documents produced by each party.

10 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
11 electronic format, the production of hard-copy documents will include a cross-reference file that
12 indicates document breaks and sets forth the custodian or custodian/location associated with each
13 produced document. Hard-copy documents will be scanned using Optical Character Recognition
14 technology and searchable ASCII text files will be produced (or Unicode text format if the text is
15 in a foreign language), unless the producing party can show that the cost would outweigh the
16 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning
17 and will not result in accurate or reasonably useable/searchable ESI). Each file will be named
18 with a unique Bates Number (e.g., the unique Bates Number of the first page of the corresponding
19 production version of the document followed by its file extension).

20 **D. Preservation of ESI**

21 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
22 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
23 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
24 as follows:

25 1. Absent a showing of good cause by the requesting party, the parties shall not be
26 required to modify the procedures used by them in the ordinary course of business to back-up and

1 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
2 possession, custody, or control.

3 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
4 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
5 where that data is created after a disclosure or response is made (unless excluded under Sections
6 (D)(3) or (E)(1)-(2)).

7 3. Absent a showing of good cause by the requesting party, the following categories
8 of ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral data
11 that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache,
13 cookies, and the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as
15 last-opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are duplicative of data that are more accessible
17 elsewhere.
- 18 f. Server, system, or network logs.
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- 20 g. Data remaining from systems no longer in use that is unintelligible on the
21 systems in use.
- 22 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
23 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a
24 copy of all such electronic data is automatically saved in real time
25 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
26 storage).

1 **E. Privilege**

2 1. A producing party shall create a privilege log of all documents fully withheld from
3 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
4 Agreement and Order. Privilege logs shall include a unique identification number for each
5 document and the basis for the claim (e.g., attorney-client privileged or work-product protection).
6 For ESI, the privilege log may be generated using available metadata, including author/recipient
7 or to/from/cc/bcc names; the subject matter or title; and date created. Should the available
8 metadata provide insufficient information for the purpose of evaluating the privilege claim
9 asserted, the producing party shall include such additional information as required by the Federal
10 Rules of Civil Procedure. Privilege logs will be produced to all other no later than 30 days after
11 delivering a production unless an earlier deadline is agreed to by the parties.

12 2. Redactions need not be logged so long as the basis for the redaction is clear on the
13 redacted document.

14 3. With respect to privileged or work-product information generated after the filing
15 of the complaint, parties are not required to include any such information in privilege logs.

16 4. Activities undertaken in compliance with the duty to preserve information are
17 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

18 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically
19 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding
20 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute
21 a waiver by the producing party of any privilege applicable to those documents, including the
22 attorney-client privilege, attorney work-product protection, or any other privilege or protection
23 recognized by law. This Order shall be interpreted to provide the maximum protection allowed
24 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained
25 herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI,
26 or information (including metadata) for relevance, responsiveness and/or segregation of

1 privileged and/or protected information before production. Information produced in discovery
2 that is protected as privileged or work product shall be immediately returned to the producing
3 party.

4 MALONEY O'LAUGHLIN

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: July 18, 2023

The Honorable John H. Chun
United States District Court Judge

The Honorable John H. Chun

The Honorable John H. Chan
United States District Court Judge

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